Nos. 18-1958 and 18-1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN MUNICIPAL POWER, INC.
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN *AMERICAN MUNICIPAL POWER, INC. AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION NO. 816,*
NLRB CASE NO. 10-CA-221403

BRIEF OF PETITIONER/CROSS-RESPONDENT AMERICAN MUNICIPAL POWER, INC.

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November 20, 2018

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Petitioner/Cross-Respondent American Municipal Power, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If Yes, list the identity of such corporation and the nature of the financial interest:

No.

Respectfully submitted

November 20, 2018

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GLOSSARY

"Act" means the National Labor Relations Act, 29 U.S.C. § 151 *et seq*.

"AMP" means Petitioner/Cross-Respondent American Municipal Power, Inc.

"Board" or "NLRB" means the National Labor Relations Board.

"Order" means the Board's Decision and Order in *American Municipal Power, Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816*, Case No. 10-CA-221403, 366 NLRB No. 160 (August 14, 2018).

"Union" means the International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816.

STATEMENT REGARDING REQUEST FOR ORAL ARGUMENT

AMP respectfully requests oral argument in this matter pursuant to 6th Cir. R. 34(a). The Court should hear oral argument because this case involves an abuse of discretion by the Board when it refused to exclude certain employees from the bargaining unit despite AMP's and the Union's agreement that those employees do not share a community of interest with the employees properly included in the bargaining unit. Rather than designate a bargaining unit that reflected the parties' agreement about those employees' lack of community of interest, the Board opted to "leave their status unanswered" without providing any proper legal justification for doing so. As a result, AMP faces an order to bargain with an inappropriate bargaining unit without any way to compel resolution of the scope of the unit issue except through this Court.

AMP respectfully submits that oral argument would assist the Court in its review of the issues presented by this appeal and in examining the Board's arbitrary and legally flawed decision.

I. JURISDICTIONAL STATEMENT

The Board conducted a union election and purportedly certified the Union as the exclusive collective bargaining representative of certain hydroelectric power plant operators of AMP. The Board's certification of the Union is invalid because the Board failed to define an appropriate bargaining unit. AMP refused to bargain with the Union to test the certification.[1] The Union filed an unfair labor practice charge challenging AMP's refusal to bargain.

On August 14, 2018, the Board issued a final Decision and Order (366 NLRB No. 160) finding that AMP violated the Act by refusing to bargain with the Union. On August 24, 2018, AMP filed the pending petition for review of the Board's Order. The Board filed a cross-application for enforcement of the Order. This Court has jurisdiction pursuant to Sections 9(d), 10(e) and (f) of the Act, 29 U.S.C. §§ 159(d), 160(e) and (f).

[1] Board decisions in representation cases are not subject to direct judicial review. To challenge a certification in court, an employer must first refuse to bargain with the union and assert the impropriety of the certification as a defense to the resulting unfair labor practice charge. Boire v. Greyhound Corp., 376 U.S. 473, 476–77 (1964).

II. STATEMENT OF THE ISSUES

A. Whether the NLRB erred by approving a bargaining unit of operators assigned to AMP's Smithland, Kentucky hydroelectric power plant ("Smithland Operators") that on its face includes operators from AMP's other facilities who occasionally work at the Smithland plant on temporary assignments ("Non-Smithland Operators") instead of excluding the Non-Smithland Operators from the bargaining unit where AMP and the Union agreed that the Non-Smithland Operators do not share a community of interest with the Smithland Operators?

B. Whether the NLRB erred by granting the General Counsel's Motion for Summary Judgment on the complaint issued against AMP in NLRB Case No. 10-CA-221403 where the bargaining unit approved by the Board in the underlying representation case on its face includes employees (the Non-Smithland Operators) who undisputedly lack a community of interest with the employees properly included in the unit (the Smithland Operators)?

III. STATEMENT OF THE CASE[2]

This is a test of certification case. The union election at issue was conducted in an inappropriate bargaining unit. Nobody claims that Non-Smithland Operators share a community of interest with Smithland Operators. Yet the Board (over AMP's objection at every turn) declined to exclude Non-Smithland Operators from the bargaining unit, directed an election in a unit that apparently includes them, and then certified the Union as the exclusive representative of that inappropriate unit. As a result, AMP faces an order to bargain with a unit that contains conflicts of interest both internally (as the Smithland Operators undoubtedly prefer to protect "their" work from the Non-Smithland Operators) and externally (as bargaining with the Non-Smithland Operators could create conflicting terms of employment at the Non-Smithland Operators' primary location). To force AMP to bargain under these circumstances is contrary to the Act, which requires that **all** employees in a bargaining unit share a community of interest.

As a result, the Board's certification of the Union is invalid and should be vacated. The Board's Order finding that AMP unlawfully refused to bargain with the Union should not be enforced.

[2] The Joint Appendix will be cited as "JA" followed by the page number.

A. AMP Operates Multiple Hydroelectric Power Plants, And The Union Filed A Petition To Represent Operators At The Smithland Plant.

AMP is a non-profit corporation that owns and operates electric power generation, transmission, and distribution facilities to provide electric power and energy to its members. (JA 119 at n. 1) AMP operates multiple hydroelectric power plants, one of which is located in Smithland, Kentucky. (Id.) AMP employs eight Operators who are permanently assigned to the Smithland plant ("Smithland Operators").[3] (JA 107; JA 120 at ¶ 4)

On January 26, 2018, the Union filed an RC petition (NLRB Case No. 10-RC-213684) seeking to represent "All full-time and regular part-time employees of the Employer preforming [sic] work at" the Smithland plant, excluding "Office Clerical employees, Professional employees, Guards and Supervisors as defined in the Act, and all other employees." (JA 115–18) AMP and the Union agree that the eight Smithland Operators should be included in the bargaining unit. (JA 120–21)

B. AMP Assigns Operators From Other Facilities To Work At The Smithland Plant On A Temporary Basis.

From time to time, AMP assigns Operators from other AMP facilities, such as the Cannelton hydroelectric power plant (also in Kentucky), to perform

[3] Operators are classified as either Operator I or Operator II. Because the distinction between these job classifications makes no difference in this case, AMP will use the term "Operator" to encompass both classifications.

Operator work at Smithland on a temporary basis ("Non-Smithland Operators"). (JA 121) As the Board found, AMP has a concrete, recent history of making such assignments. AMP temporarily assigned four Operators from Cannelton to Smithland in 2017 who performed Operator work at Smithland for a total of at least 12 days. (JA 121) AMP also assigned Joe Frakes, who at the time was an Operator from Cannelton, to work at Smithland on a temporary basis in 2017 and 2018. (JA 121–22) Frakes worked at Smithland for five days per week from around June 2017 to October 2017 and then about one day per week from October 2017 until mid-January 2018. (Id.) Frakes spent about half of his time at Smithland performing Operator work. (Id.) Frakes last worked at Smithland only days before the petition in this case was filed. (JA 120 at ¶ 5; JA 45)

Such temporary assignments have occurred and will occur in the future under various operational scenarios, including where Smithland Operators require training or otherwise lack the needed expertise to perform a necessary task, or where there are staffing issues. (JA 121–22; JA 49) AMP will also assign Non-Smithland Operators to work at Smithland during outages in order to decrease the downtime associated with the outage, as AMP has done for outages at other facilities. (JA 65–66) Outages at Smithland, both planned and unplanned, are inevitable. (Id.)

C. AMP And The Union Agree That Non-Smithland Operators Do Not Share A Community Of Interest With Smithland Operators.

At the hearing in the underlying representation proceeding, the Union admitted under questioning from the Hearing Officer that Non-Smithland Operators temporarily assigned to Smithland should be excluded from the bargaining unit based on a lack of community of interest. (JA 20–21) The Regional Director acknowledged that "The Petitioner agrees that only the eight employees currently employed at the Smithland facility should be eligible to vote. . . ." (JA 121 at ¶ 1)

D. The Board Nevertheless Certified The Union As The Exclusive Representative Of A Bargaining Unit That On Its Face Includes Non-Smithland Operators Temporarily Assigned At Smithland.

The only disputed issue in the underlying representation case was whether Non-Smithland Operators should be excluded from the bargaining unit. (JA 120 at ¶ 1) Despite AMP's and the Union's agreement that Non-Smithland Operators do not share a community of interest with Smithland Operators, the Regional Director did not exclude them, deciding to "leave their status unanswered for now." (JA 120–21) The Regional Director directed an election among and then certified the Union as the exclusive representative of the following bargaining unit:

> All full-time and regular part-time Operator I and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky, excluding office clerical

> employees, professional employees, confidential employees, guards, and supervisors as defined in the Act.

(JA 120; JA 129) This unit is broad enough to include Non-Smithland Operators, as they are Operators employed by AMP at the Smithland plant, albeit temporarily from time-to-time.

E. The Board Denied AMP's Request To Review The Regional Director's Decision Despite Acknowledging The Decision's Flawed Legal Analysis.

The Regional Director offered two reasons for refusing to exclude Non-Smithland Operators from the unit. First, the Regional Director thought an explicit exclusion from the unit was unnecessary because on the day of the hearing AMP did not have Non-Smithland Operators assigned to Smithland nor did AMP have sufficiently definite plans for such assignments in the future. (JA 123) In other words, the temporary Operator classification was empty on that particular day and AMP supposedly lacked specific plans to fill it. Second, due to this perceived lack of current assignments or sufficiently definite plans for future assignments of Non-Smithland Operators at Smithland, the Regional Director further concluded that the unit placement of Non-Smithland Operators should be "[left] unanswered for now" to be addressed in future collective bargaining instead of in the representation proceeding. (JA 123–24) But the Regional Director simultaneously agreed with the Union that this same unit placement issue is a permissive rather than a

mandatory subject of bargaining (i.e., an issue that neither party can compel the other to resolve in bargaining). (JA 121 at ¶ 1, 123 at ¶ 3)

AMP filed a request for review of the Regional Director's decision and direction of election. (JA 131–42) On May 31, 2018, the Board denied AMP's request for review and upheld the Regional Director's unit determination. (JA 143) The Board disavowed the Regional Director's citation to inapplicable case law in support of the erroneous conclusion that a vacant job classification need not be addressed in a representation proceeding. (Id. at n. 1) The Board further rejected the Regional Director's analysis, stating that, "contrary to the Regional Director's suggestion, the Board will in fact exclude as temporary an otherwise-permanent employee who is only temporarily assigned to the facility at which an election is being conducted. See *Marian Medical Center*, 339 NLRB 127, 128–29 (2003)." (Id.)

The Board did not address the Regional Director's erroneous conclusion that the unit placement of Non-Smithland Operators can be addressed through collective bargaining. However, the Board noted that AMP "may be able to resolve the unit placement of future temporary assignees . . . through the unit-clarification process" (id.), seemingly recognizing that AMP's only recourse (aside from this appeal) would be to litigate the unit placement issue in a subsequent

representation proceeding as AMP cannot compel resolution of this permissive subject of bargaining through negotiations.

F. AMP Refused To Bargain With The Union In Order To Test The Board's Certification, Leading To The Board's Order That Is The Subject Of This Petition For Review.

Due to the Board's refusal to exclude Non-Smithland Operators (whom AMP intends to assign at Smithland when it sees fit) from the bargaining unit, AMP refused to bargain with the Union to test the Board's certification. After the Union filed a charge (JA 153) and a complaint was issued (JA 154–58), the Board issued the Order granting the General Counsel's motion for summary judgment. The Board relied upon and upheld the prior unit determination in the underlying representation proceeding. (JA 1)

AMP filed the pending petition for review of the Board's Order (JA 4–5), and the Board filed a cross-application for enforcement of its Order. (JA 6–7)

IV. SUMMARY OF THE ARGUMENT

The Act compels the Board to resolve disputes as to the appropriateness of a bargaining unit in a representation proceeding. In the representation case underlying this appeal, the Board had only one unit placement dispute to resolve: whether to exclude Non-Smithland Operators temporarily assigned at Smithland who undisputedly lack a community of interest with Smithland Operators from the bargaining unit. The Board arbitrarily refused to fulfill this statutory obligation.

The Board refused to exclude employees who undisputedly lack a community of interest with employees appropriately included in the unit, opting instead to "leave their status unanswered for now so the parties may handle their placement through the collective bargaining process . . . ." (JA 120) The Board offered no valid legal basis for its decision not to fulfill its statutory duty to determine an appropriate unit and to instead pass on to the parties the task of resolving a scope of the unit issue in collective bargaining, which the Board knows is a permissive subject of bargaining the resolution of which neither party can compel.

The Board seemed to acknowledge that collective bargaining would be inappropriate to resolve this unit placement issue, as the Board suggested AMP may have to resort to further litigation through the unit clarification process to resolve it. However, the unit clarification process is only appropriate to resolve unit placement ambiguities that arise in the midst of a collective bargaining relationship due to new or changed circumstances. The unit clarification process would be inappropriate in this context because the disputed employment classification clearly exists now, any future dispute over it would not be new, and thus the issue should have been decided in the underlying representation proceeding.

AMP has a concrete, recent history of temporary assignments of Non-Smithland Operators at Smithland. AMP will continue to make such assignments in the future under certain reasonably foreseeable and likely operational scenarios. Therefore, AMP needs to know whether Non-Smithland Operators temporarily assigned at Smithland are included or excluded from the unit. But the Board arbitrarily and unreasonably decided to "leave their status unanswered."

AMP is not legally required to bargain with the Union over terms and conditions of employment for a unit that includes employees who do not share a community of interest. As these employees are not permanently assigned to Smithland, they have different and conflicting interests from the Smithland Operators. Bargaining over the Non-Smithland Operators' terms and conditions of employment would involve conflicts of interest for the Union and incredible practical difficulties for AMP. The Smithland Operators likely would want a contract to **prohibit** the Non-Smithland Operators from working at Smithland to protect "their" work. The Non-Smithland Operators likely would not want restrictions on the work they can perform. But there are other practical problems. Would any terms and conditions of employment theoretically negotiated on behalf of the Non-Smithland Operators follow them back to their permanent assignment at a different plant, creating potential inconsistency and discord between the Non-Smithland Operators and the other employees assigned to other plants? Would a

hypothetical strike at Smithland include employees located at other facilities who had worked temporarily at Smithland? The Act's requirement that bargaining unit employees share a community of interest prevents employers from having to deal with such problems.

The Board arbitrarily and unreasonably refused to decide the unit placement of Non-Smithland Operators temporarily assigned at Smithland resulting in an inappropriate unit for purposes of collective bargaining. And the Board did so despite it being undisputed that the Non-Smithland Operators lacked a community of interest with the Smithland Operators such that they should not have been allowed to vote in the election. Accordingly, the Board's certification of the Union as the exclusive representative of that inappropriate unit should be vacated. Likewise, the Board's Order that AMP violated the Act by refusing to bargain in the face of that invalid certification should also be vacated.

V. ARGUMENT

A. Standard Of Review

The Board's factual findings are upheld only if supported by substantial evidence based on the record as a whole. 29 U.S.C. § 160(f). "This standard, though deferential, does not permit the Board to ignore relevant evidence that detracts from its findings." GGNSC Springfield LLC v. NLRB, 721 F.3d 403, 407 (6th Cir. 2013) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488

(1951)). When the Board "fails to consider important evidence, its conclusions are less likely to rest upon substantial evidence." Id. (internal quotations and citation omitted).

Concerning the Board's legal conclusions, this Court should set aside the Board's unit determination if it is arbitrary, unreasonable, or an abuse of discretion. Kindred Nursing Centers E., LLC v. NLRB, 727 F.3d 552, 558 (6th Cir. 2013). Although the Board has discretion to determine the appropriate unit, "[i]n exercising its discretion, however, the Board 'must cogently explain why it has exercised its discretion in a given manner.'" Id. at 559 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983)).

B. The Board Erred By Refusing To Exclude Non-Smithland Operators From The Bargaining Unit Despite AMP's And The Union's Agreement That They Lack A Community Of Interest With Smithland Operators, So The Board's Resulting Certification Of The Union Is Invalid.

Pursuant to Section 9(b) of the Act, 29 U.S.C. § 159(b), the Board is required to determine "in each case . . . the unit appropriate for purposes of collective bargaining." To be an "appropriate" unit, employees included in the unit "must share a 'community of interest sufficient to justify their mutual inclusion in a single bargaining unit.'" Armco, Inc. v. NLRB, 832 F.2d 357, 362 (6th Cir. 1987) (quoting Pac. Sw. Airlines v. NLRB, 587 F.2d 1032, 1038 (9th Cir. 1978)); see also Bry-Fern Care Ctr., Inc. v. NLRB, 21 F.3d 706, 709 (6th Cir. 1994)

(accord). In other words, employees who lack a community of interest must be excluded from the bargaining unit.

The Board's purpose in selecting an appropriate bargaining unit is two-fold:

> insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. **Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.**

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962) (citation omitted) (emphasis added). Forcing bargaining with a group of employees including individuals who lack the necessary community of interests threatens both employee rights and industrial peace. Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 172–73 (1971).

According to the Supreme Court, Section 9(b) of the Act requires that "whenever there is a disagreement about the appropriateness of a unit, **the Board**

shall resolve the dispute." Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 611 (1991) (emphasis added). The only dispute before the Board in the representation proceeding underlying this appeal was whether to exclude Non-Smithland Operators, or (as the Regional Director put it) "whether to leave their status unanswered for now so that the parties may handle their placement through the collective-bargaining process should the issue arise in the future." (JA 120 at ¶ 1)

There is **no** dispute that Non-Smithland Operators do not share a community of interest with Smithland Operators. The Union admitted they lack a community interest during the hearing (JA 20–21), and the Regional Director acknowledged the Union's position that Non-Smithland Operators should be ineligible to vote and thus not be included in the unit (JA 120–21).[4] In addition to the parties' agreement on this point, the Board has made clear that temporary employees, including permanent employees of an employer temporarily assigned to another facility, do not share a community of interest with regular or permanent employees. Marian Medical Center, 339 NLRB 127, 128–29 (2003).

The Regional Director found that AMP has a concrete, recent history of temporary assignments of Non-Smithland Operators at Smithland. (JA 121–22) There is no dispute that AMP will make such assignments in the future under

[4] The Board's policy is that unit placement and voting eligibility are inseparable issues; any employee who may be represented as the result of an election has the right to vote in that election. Post Houses, Inc., 161 NLRB 1159, 1172–73 (1966).

certain foreseeable and likely circumstances. (JA 65–66)[5] There is also no dispute that the petitioned-for unit is broad enough on its face to include such Non-Smithland Operators; the Union did not disagree but instead asked the Board not to adjust the overbroad unit so the parties could negotiate this unit placement issue at some point in the future. (JA 120–21)

Despite these undisputed facts, the Board refused to exclude Non-Smithland Operators from the unit and opted instead to "leave their status unanswered" and let the parties negotiate over this unit placement issue. (Id.) In doing so, the Board arbitrarily and unreasonably failed to fulfill its statutory duty to resolve the only dispute before it regarding the appropriateness of the unit: whether to exclude Non-Smithland Operators temporarily assigned at Smithland.

Because the bargaining unit designated by the Board on its face includes Non-Smithland Operators temporarily assigned at Smithland, who undisputedly lack a community of interest with Smithland Operators and who AMP intends to assign to Smithland when it sees fit, the bargaining unit is inappropriate. The Board's resulting certification of the Union as the exclusive representative of this inappropriate unit should be vacated. The Act does not allow the Board to force

[5] The Board's failure to give proper weight to AMP's evidence of circumstances where it intends to make temporary assignments to Smithland in the future is discussed in Part V.B.1 below.

AMP to bargain over the terms and conditions of employment of Operators who do not share a community of interest.

1. The unit placement of Non-Smithland Operators should have been addressed in the representation proceeding regardless of the existence of current assignments or "finite" plans for future assignments of Non-Smithland Operators at Smithland.

In justifying the Board's refusal to exclude Non-Smithland Operators to instead leave their disputed unit placement status unsettled, the Regional Director relied heavily on the fact that Non-Smithland Operators were not working at Smithland at the precise time of the petition and the hearing and that AMP did not have "finite plans" to assign Non-Smithland Operators at Smithland in the immediate future. (JA 123) The Regional Director opined that because AMP "has no current plans to temporarily assign employees to Smithland . . . . There is no such concern compelling me to settle the status of the Employer's employees temporarily assigned to the Smithland facility." (Id.) "Board law also supports omitting the placement of employees temporarily assigned to Smithland in the absence of any finite plans on the Employer's part to resume assigning these employees to that facility." (Id.)

However, the Regional Director identified no authority that supports this proposition. Instead, the Regional Director attempted to distinguish cases finding that individuals in disputed classifications, such as temporary workers, need not be actively working in order to have their unit status resolved in a representation case.

See e.g., Indiana Bottled Gas Co., 128 NLRB 1441 (1960) (specifically excluding "temporary and casual employees" at a time when no such employees were employed); F.W. Woolworth, 119 NLRB 480 (1957) (accord).

The Regional Director claimed Indiana Bottled Gas and F.W. Woolworth are inapplicable because they dealt with "ephemeral" or seasonal "temporary employees . . . who have a finite end date for their employment separate from permanent employees," as opposed to AMP's Non-Smithland Operators on temporary assignment at Smithland who are otherwise permanent employees. (JA 123) However, the case cited by the Regional Director in support of this supposed distinction found precisely to the contrary, that a permanent employee temporarily assigned at a facility where an election is taking place should be excluded from the unit due to a lack of community of interest, the same as any other temporary employee. Marian Medical Center, 339 NLRB 127, 128–29 (2003). The Board agreed the Regional Director was wrong on this point and disavowed the incorrect citation of Marian Medical Center. (JA 143 at n. 1) So under the Board's own analysis, the fact that the Non-Smithland Operators were full-time AMP employees was **not** a valid reason to refuse to resolve the unit status of the Non-Smithland Operators.

The Regional Director also incorrectly concluded that the unit placement of Non-Smithland Operators need not be decided because AMP "has no current plans

to temporarily assign employees to Smithland," as compared to the employers in Indiana Bottled Gas and F.W. Woolworth which hired temporary employees on a routine basis. (JA 123) This conclusion is not only legally unfounded, but it also ignores significant evidence of AMP's intent to temporarily assign Non-Smithland Operators at Smithland in the future.

Neither Indiana Bottled Gas nor F.W. Woolworth nor any other case cited by the Regional Director supports the proposition that an employer must have "finite" or "current plans" to employ employees in the future in a classification that is empty at the time of the representation proceeding in order to decide the unit placement of such employees. As the Board confirmed, the Regional Director erroneously cited an inapplicable unit clarification case in support of this incorrect legal conclusion. (JA 143 at n. 1) The other unit clarification case cited by the Regional Director is also inapplicable and does not support the proposition that

unit placement of empty classifications need not be decided absent "finite plans" to resume such assignments in the future.[6] The Regional Director (and the Board) identified no other applicable authority in support of this proposition.

Additionally, assuming arguendo that the Regional Director is correct that an employer must have definite plans to utilize an empty classification in the future to necessitate a unit placement decision (a legal proposition the Regional Director and Board have failed to support), the Regional Director's conclusion that AMP "has no current plans to temporarily assign employees [i.e., Non-Smithland Operators] to Smithland" (JA 123) is not supported by substantial evidence. The Regional Director failed to consider evidence that AMP plans to temporarily assign Non-Smithland Operators at Smithland in the future under several likely operational scenarios, including the need for specific expertise, to address staffing issues (JA

[6] In Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993), the employer filed a unit clarification petition seeking to include production employees in a unit following a 12-year hiatus. In stating that "the Board looks to the actual, existing composition of units and to employees actually working to determine the composition of units, not to abstract grants of recognition," the Board was pointing out that it was irrelevant that production employees had been included in pre-hiatus recognition clauses because the production employees post-hiatus shared a community of interest separate and distinct from the other employees in the bargaining unit. In other words, the Board held that determinations on unit composition must be made based on the nature of the workforce at the time of the representation proceeding, regardless of whether employees may have shared a community of interest (or been included in a recognition clause) at some time in the past. The Board did not hold in Coca-Cola Bottling that employees must be currently working in a disputed classification for the unit placement of that classification to be decided in a representation proceeding.

122), and assistance with outages at Smithland. (JA 65–66) The Regional Director ignored the issue of outages altogether, and otherwise did not give proper weight to the other scenarios that could necessitate such assignments in the future.

As shown above, AMP explained the definite, foreseeable, and likely scenarios where it will continue to temporarily assign Non-Smithland Operators at Smithland at the hearing. AMP's evidence was unrebutted. The Board did not reject it. Other than identifying a future temporary assignment involving individually identified Non-Smithland Operators on a date certain, it is hard to see how AMP could have provided more definite evidence than it did at the hearing. In any event, the Board identified no authority that would purport to require that AMP establish the existence of such specific plans as a precondition to the Board's statutory duty to make an appropriate unit placement decision, particularly when the fact that the Non-Smithland Operators lack a community of interest with the Smithland Operators is undisputed.

These definite, reasonably foreseeable operational circumstances, coupled with AMP's concrete, recent history of temporarily assigning Non-Smithland Operators at Smithland (five assignments in the year before the election, including one assignment lasting about seven months and ending just days before the petition was filed) (JA 121–22), establish that AMP does in fact intend to temporarily assign Non-Smithland Operators to Smithland when these operational scenarios

arise. AMP's temporary assignment of Non-Smithland Operators at Smithland is not a hypothetical issue that may never "arise in the future" such that it can be left unanswered for now. (JA 120)

Moreover, the fact that a Non-Smithland Operator's temporary assignment at Smithland ended just days before the petition was filed (JA 120–122) further demonstrates the arbitrariness of the Regional Director's conclusion that there was no basis "compelling me to settle the status of the Employer's employees temporarily assigned to the Smithland facility" (JA 123). The fact that the petition happened to be filed in late January (when Frakes was not working at Smithland) as opposed to mid-January (when he was) should not have been given any weight, much less seemingly controlling weight. Had the petition been filed just a few days earlier, the Regional Director apparently would have resolved this dispute. The coincidence that Non-Smithland Operators did not happen to be working at Smithland at the moment the petition was filed and that on the day of the hearing AMP did not have a set schedule for future temporary assignments or know precisely when such a need would arise is not a valid reason to fail to resolve the unit placement issue in this case.

2. The unit placement of Non-Smithland Operators is a permissive subject of bargaining that cannot be resolved in negotiations over the objection of one party, so collective bargaining is not a suitable option for deciding this unit placement dispute.

As a further justification of the Board's refusal to exclude Non-Smithland Operators from the unit and to instead "leave their status unanswered for now," the Regional Director found that "such an issue is one that is better resolved through the collective-bargaining process." (JA 124) This conclusion is apparently an extension of the Regional Director's arbitrary determination that AMP did not have sufficiently specific plans to continue temporarily assigning Non-Smithland Operators at Smithland in the future. The Regional Director stated:

> In the event the Employer changes plans and routinely assigns such employees to the Smithland facility in the future, there may be factors that make including them in the unit a more compelling argument than the truly ephemeral employees in *Indiana Bottle Glass* and *FW Woolworth*. Leaving the temporarily assigned employees out of the exclusions at this time leaves more room for the parties to adjust their unit description by negotiation, if they wish, in the event the Employer begins to assign such employees to Smithland.

(JA 123)

As discussed above, AMP had in fact made several assignments of Non-Smithland Operators in the very recent past, including one ending only a few days before the petition. The Regional Director also improperly disregarded evidence of AMP's plans to continue assigning Non-Smithland Operators at Smithland. The

Board was wrong to treat this as a hypothetical issue that could only be addressed in the future if AMP "changes plans" or "begins to assign such employees to Smithland." (Id.) AMP has a concrete, recent history of, and a clear plan to continue, making such assignments in the future. (JA 121–22, 65–66)

AMP needs to have the Non-Smithland Operators on temporary assignment at Smithland excluded from the bargaining unit to bargain effectively over the Smithland Operators' terms and conditions of employment and to avoid terrible practical problems. The Non-Smithland Operators have interests different from and conflicting with the Smithland Operators. The Smithland Operators may want to have a contract that prohibits such assignments altogether to preserve "their" work, something the Non-Smithland Operators presumably would oppose. For its part, AMP has no interest in bargaining over the terms and conditions of employment for employees who are permanently assigned to other locations. Such bargaining could result in inconsistent terms and conditions of employment at other AMP locations and cause labor unrest. Accordingly, the Board had a statutory duty to resolve this unit placement dispute in the representation proceeding, which the Board arbitrarily left "unanswered" (JA 120) even though the absence of a community of interest was undisputed.

It is well-established that the scope of the bargaining unit is a **permissive** subject of bargaining, so AMP cannot compel in bargaining resolution of whether

particular employee classifications are inside or outside the bargaining unit. Raymond F. Kravis Ctr. for the Performing Arts, 351 NLRB 143, 144 (2007) ("The scope of the bargaining unit is a permissive subject of bargaining over which a party may not insist to impasse."); Grosvenor Orlando Assocs., Ltd., 336 NLRB 613, 617 (2001) (collecting cases) ("The Board has long held that '[u]nit scope is not a mandatory bargaining subject, and consequently a party may not insist to impasse on alteration of the unit.'") (citations omitted); Branch Int'l Servs., 310 NLRB 1092, 1103 (1993) (accord); Chicago Beef Co., 298 NLRB 1039, 1049 (1990) (accord); Syncor Int'l Corp., 282 NLRB 408, 409 (1986) (accord).

Despite acquiescing to the Union's request that this unit placement issue remain unresolved and be left to collective bargaining, the Regional Director simultaneously agreed with the Union that this precise unit placement issue is a permissive subject of bargaining. (JA 121 at ¶ 1, 123 at ¶ 3) Accordingly, it is unreasonable to "leave unanswered" the disputed unit placement status of Non-Smithland Operators temporarily assigned at Smithland (particularly where they undisputedly lack the requisite community of interest), as neither AMP nor the Union has the ability to compel a resolution of this issue through bargaining.

Neither the Regional Director nor the Board identified any applicable authority to support the conclusion that a dispute in a representation proceeding as to unit placement should be resolved by the parties in collective bargaining rather

than by the Board as required by Section 9(b) of the Act. The Regional Director offered one erroneous citation in support of that conclusion: Union Electric Co., 217 NLRB 666 (1975). In that case, the Board observed that:

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category-excluded or included-that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals.

Id. at 667. Because the unit clarification petition in Union Electric did not address changed circumstances, but instead sought to alter "contractual and established exclusions" from a bargaining unit, those issues were "to be resolved through the collective-bargaining process or in a proceeding under Section 9(c) of the Act." Id. In AMP's case, collective bargaining cannot resolve the unit placement issue given the permissive nature of bargaining over the scope of the unit.

In ruling on AMP's request for review, the Board did not address the Regional Director's erroneous conclusion that the unit placement of Non-Smithland Operators can be addressed through collective bargaining. However, the Board noted that AMP:

> may be able to resolve the unit placement of future temporary assignees, under the appropriate circumstances, through the unit-clarification process. See *Union Electric Co.*, 217 NLRB 666, 667 (1975) (unit clarification petition can be used to resolve ambiguities regarding the unit placement of either newly-established classifications or those that have undergone 'recent, substantial' changes).

(JA 143 at n. 1). The Board therefore seemed to acknowledge that AMP's only recourse (aside from this appeal) would be to litigate the unit placement issue in a subsequent representation proceeding as AMP cannot compel resolution of this permissive subject of bargaining through negotiations. However, the Board overlooked the fact that such "ambiguities" over the unit placement of AMP's continued temporary assignment of Non-Smithland Operators at Smithland would be due solely to the Regional Director's arbitrary refusal to resolve the dispute in the representation proceeding, not because of any newly-established classification or any substantial changes to such assignments.

Assuming arguendo that the unit clarification process would be an appropriate procedural mechanism to determine the unit placement of Non-Smithland Operators temporarily assigned at Smithland (which it is not), there is no good reason to force AMP to pursue such litigation in order to attempt to rectify the Board's inappropriate unit determination. It would unduly burden AMP to force it to bargain over terms and conditions of employment for an ill-defined group of employees (which may or may not include Non-Smithland Operators who

would have different and likely conflicting concerns compared to Smithland Operators), with AMP's only legal recourse being to engage in further litigation over an issue that could have and should have been resolved in the underlying representation proceeding. This is especially true in this case where there was no dispute the employees in question do not share a community of interest, yet the Board arbitrarily and unreasonably refused to exclude them.[7]

Under these circumstances, AMP should not be saddled with the legal risk and uncertainty of the Board's failure to define a unit appropriate for collective bargaining. The Board's failure to do so would hamper future bargaining and create practical problems for AMP. The Board's certification of the Union as the exclusive representative of a bargaining unit that on its face includes employees who undisputedly lack a community of interest—the result of the Board's arbitrary refusal to fulfill its statutory duty to resolve a disputed unit placement issue—should be vacated.

[7] Interestingly, the Union failed to intervene in this case. Intervention would have required the Union to explain the conflict between its admission that the Non-Smithland Operators do not share a community of interest with the Smithland Operators such that the Non-Smithland Operators should not have voted in the election while simultaneously opposing AMP's repeated efforts to have the Non-Smithland Operators expressly excluded from the unit.

C. The Board Erred By Granting The General Counsel's Motion For Summary Judgment Because AMP Has No Duty To Bargain With The Union Due To The Board's Invalid Certification.

As explained above, the Board's certification of the Union is invalid because the Board arbitrarily failed to define a bargaining unit appropriate for purposes of collective bargaining. As a result, AMP has no duty to bargain with the Union.

Accordingly, the Board's Order should be vacated.

VI. CONCLUSION

For each and all of the foregoing reasons, AMP respectfully requests that its petition for review be granted and that the Board's cross-application for enforcement be denied. The Board's Certification of the Union in the representation case and the Board's Order in the unfair labor practice case should be vacated.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 6,514 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on November 20, 2018, I filed the foregoing Brief of Petitioner/Cross-Respondent American Municipal Power, Inc., using the Court's CM/ECF filing system which will send electronic notice to all parties or their counsel of record.

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